No. 80-1169

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FAULKNER RADIO, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission properly employed the "preponderance of evidence" test in denying petitioner's application for a broadcast license renewal on the grounds of misrepresentation and abuse of process.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is unpublished. The initial opinion of the court of appeals remanding the case to the Commission (Pet. App. 36a-54a) is reported at 557 F. 2d 866. The opinions of the Federal Communications Commission (Pet. App. 3a-11a, 15a-16a, 17a-35a) are reported at 72 F.C.C. 2d 264, 69 F.C.C. 2d 424, and 69 F.C.C. 2d 1139.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1980. The petition for a writ of certiorari was filed on January 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1967, William P. Johnson and Hollis B. Johnson (no relation), doing business as Radio Carrollton,

filed an application with the Federal Communications Commission for a permit to construct and operate a new radio station in Carrollton, Georgia. Faulkner Radio, the licensee of the only existing radio station in Carrollton, petitioned the Commission to deny Radio Carrollton's application on the grounds of alleged character and financial deficiencies and an alleged failure to ascertain properly the needs and interests of the community. Radio Carrollton's opposition to that petition charged Faulkner with material misrepresentations and abuse of process. Because both parties had made serious charges against the other that reflected on their qualifications to be Commission licensees, Radio Carrollton's broadcast application and Faulkner's application to renew its own broadcast license were designated for a consolidated hearing (Pet. App. 119a-126a).

At the conclusion of the hearing, the Administrative Law Judge ("ALJ") found that Faulkner Radio had "embarked on an apparently calculated campaign to mislead and deceive this Commission * * * for the purpose of thwarting or delaying the initiation of a competing broadcast service in Carrollton, Georgia" (Pet. App. 107a). Evidence pertaining to three incidents supported that conclusion. First, contrary to statements submitted on behalf of Faulkner Radio, the evidence showed that Robert Thorburn, Faulkner's vice president and general manager, admitted in a telephone conversation with Hollis Johnson that because of financial difficulties experienced by Faulkner, he filed the petition to deny against Radio Carrollton in order to delay the advent of competition for a few months until Faulkner could acquire sufficient funds to meet certain corporate obligations (*id.* at 78a-82a). Second, the evidence showed that Thorburn submitted to the Commission a fraudulently induced, inaccurate, and improperly executed affidavit by the owner of the land specified by Radio Carrollton as the

site for its antenna tower (Pet. App. 92a-97a).[1] Finally, the evidence indicated that Thorburn had contacted a radio engineer to explore the possibility of filing an application mutually exclusive with that of Radio Carrollton in order thus to ensure that the Radio Carrollton application could not be granted without a lengthy and costly hearing. The ALJ was openly skeptical about the veracity of Thorburn's testimony about his dealings with the engineer (*id.* at 82a-84a).

At the conclusion of the hearing, the ALJ found Thorburn's testimony concerning these and other incidents to be evasive, misleading, and contradictory, and, accordingly, he denied Faulkner's license renewal on the grounds of willful and intentional misrepresentation (Pet. App. 113a). As an alternative and independent ground, the ALJ also denied the license renewal because Faulkner's petition to deny the Radio Carrollton application was a "strike petition," *i.e.*, it was "undoubtedly filed with this Commission primarily for the purpose of causing delays in the processing of Radio Carrollton's application and thereby postponing the day when it might have to be confronted with competition in Carrollton, Georgia" (*id.* at 113a). The Commission affirmed the ALJ's decision (Pet. App. 59a-72a).

2. The court of appeals remanded the case to the Commission for further proceedings (Pet. App. 36a-54a). The court noted (*id.* at 41a-42a) that the ALJ had afforded a

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[1]The owner, O.S. Whitman, stated in his affidavit that the land was no longer available, thus making it appear that Radio Carrollton had failed to keep the Commission informed of major changes in the status of its application as required by Commission rules. Whitman, however, had never told the Johnsons that the antenna site was no longer available and Thorburn had obtained the affidavit by falsely telling Whitman that the Johnsons planned to sue Whitman to enforce an option on the land. Moreover, the affidavit had not been executed with any of the requisite formalities (Pet. App. 92a-97a).

presumption of veracity to the testimony of the Johnsons because they were lawyers, and that, in affirming the conclusion of the ALJ, the Commission had evidently concurred. The court concluded that the presumption was not justified, and directed the Commission to reconsider the case without applying the erroneous presumption (Pet. App. at 36a, 48a). The court also expressed concern that the Commission's "strike" policy could penalize broadcasters who file petitions to deny with even a minor, incidental motive to delay action on the potential competitor's application. Because, in the court's view, such a broad prohibition might have an undue chilling effect, it instructed the Commission to refine its policy so as to remove the potential chill (*id.* at 52a-54a).

3. On remand, the Commission performed a de novo review of the testimony and documentary evidence and, mindful of the court of appeals' holding against affording any presumption of lawyer veracity, reaffirmed its earlier findings that Thorburn's testimony was so riddled with contradictions, equivocations, and inconsistencies that lack of candor and misrepresentation were evident. Accordingly, the Commission held that on this ground alone Faulkner's license renewal should be denied (Pet. App. 19a-26a).[2] Subsequently, to avoid any misunderstanding of its opinion, the Commission declared that it had employed the customary "preponderance of the evidence" test in its

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[2]The Commission also clarified its "strike" policy, declaring that it would penalize only those licensees who file petitions against potential competitors when the *primary* purpose of the petition is to delay the administrative proceedings. It established evidentiary criteria that would assist it in discerning whether there was such a primary purpose and, employing those criteria, it found that Faulkner had engaged in improper conduct in filing its application to deny Radio Carrollton's application. On that additional ground, the Commission again declared Faulkner to be unqualified to remain a Commission licensee (Pet. App. 26a-33a).

review of the evidence in this case (Pet. App. 15a-16a). The court of appeals summarily affirmed the Commission's decision (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. There is no need for the Court to reach petitioner's challenge to the Commission's "strike petition" policy in the context of a petition to deny, since the Commission concluded, and the court of appeals agreed, that Faulkner's misrepresentations and lack of candor constituted sufficient and independent grounds for denying Faulkner's renewal application (Pet. App. 2a, 19a, 26a).[3] See *Barr* v. *Matteo*, 355 U.S. 171, 172 (1957).[4]

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[3]Indeed, the Commission viewed the misrepresentations and lack of candor as the more dispositive ground for denying renewal (Pet. App. 19a). It proceeded to clarify its strike policy because the court of appeals had directed it to do so on remand (*id.* at 26a).

[4]In any event, the argument does not warrant this Court's review. This Court's decisions in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), relied upon by petitioner (Pet. 10-11), do not support petitioner's alleged right to file with impunity a petition to deny where the primary purpose of the petition is to obstruct the Commission's action on applications of potential competitors. On the contrary, this Court has specifically recognized that "unethical conduct in the setting of the adjudicatory process often results in sanctions." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972).

Nor, contrary to petitioner's suggestion (Pet. 13-15), does the Commission's strike policy contravene Section 309(d) of the Communications Act of 1934, 47 U.S.C. 309(d), which affords existing licensees the right to file petitions to deny competing broadcast license applications. As the Commission properly concluded, the right to administrative process for petition and redress does not incorporate the right to abuse that process with impunity (Pet. App. 28a).

2. The Commission has the power to deny a license renewal because of misrepresentations to the Commission. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). Faulkner argues (Pet. 15-22), however, that in view of the severity of the sanction levied in this case, the Commission should have employed a "clear and convincing test" in its weighing of the evidence, instead of the customary "preponderance" test.

This argument is foreclosed by this Court's recent decision in *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981). In *Steadman*, the Court held that under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), the Securities and Exchange Commission had properly applied a preponderance of the evidence standard of proof in a disciplinary proceeding brought to determine whether an investment adviser had violated the securities laws. After reviewing the language and legislative history of Section 7(c), the Court concluded that Congress had "expressed its intent that adjudicatory proceedings subject to the APA satisfy the statute where determinations are made according to the preponderance of the evidence." *Steadman* v. *SEC, supra*, slip op. 13. Under *Steadman*, therefore, the Commission properly relied upon Section 7(c) as authority for application of the preponderance standard (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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